United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 77-7205

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

IMAGE CARRIER CORPORATION,
Plaintiff-Respondent,

—against—

ABRAHAM D. BEAME, Mayor of New York City, et al.,
Defendants-Appellants.

THE HOUSE OF LITHOGRAPHY, INC., et al.,
Plaintiffs-Respondents,

—against—

ABRAHAM D. BEAME, Mayor of New York City, et al.,
Defendants-Appellants.

INTERVENOR-APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
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TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
POINT I—Judge MacMahon should have abstained from exercising jurisdiction	5
POINT II—Plaintiffs lack standing, or have failed to demonstrate their right to obtain relief	8
POINT III—A rational connection exists between the defendants' union label requirement for flat form printing work and their desire to insure that the prevailing wage rate be paid to printing tradesmen	13
POINT IV—New York State and Federal public policy foster prevailing wage rates for public work	25
POINT V—New York State public policy fosters collective bargaining	27
CONCLUSION	31

Cases Cited

Alevy v. Downstate Medical Center, 39 N.Y. 2d 326 (1976)	11
Amalithone Realty Co. v. City of New York, 162 Misc. 715 (Sup. Ct., N.Y. 1937) aff'd 251 App. Div. 450 (1st Dept. 1937)	6
Ballerina Pen Co. v. Kunzig, 453 F.2d 1204 (D.C. Cir. 1970)	8, 9

PAGE

City Chemical Corporation v. Shreffler, 331 F.Supp. 46 (S.D.N.Y. 1971) 9

DeCanas v. Bica, 96 Sup. Ct. 933 27

DeFunis v. Odegaard, 416 U.S. 312 11

Huffman v. Pursue, 420 U.S. 592 7

Juidice v. Vail., U.S. Sup. Ct., No. 75-1397, March 22, 1977 8

Massachusetts Board of Retirement v. Murgia, 44 U.S.L.W. 5077 (U.S. June 26, 1976) 24

Master Printers Ass'n. v. Board of Trustees of Junior College Dist. No. 508, City of Chicago and State of Ill. 356 F. Supp. 1355 (N.D. Ill. 1973) 8, 9

McRedmond v. Wilson, 533 F.2d 757 5

National League of Cities v. Usery, 96 S.Ct. 2465 ....26, 27

San Antonio School District v. Rodriguez, 411 U.S. 1 25

Trainor v. Hernandez, No. 75-1407 (May 31, 1977) 7

Warth v. Seldin, 422 U.S. 490 (1975) 9

Younger v. Harris, 401 U.S. 37 ..... 7, 8

United States Constitution Cited

Fourteenth Amendment 4, 7

New York Constitution Cited

Article 1, Section 17 25

PAGE

Statutes Cited

Fair Labor Standards Act 26

National Labor Relations Act 28

New York State Labor Law:

Sec. 220 ..... 6, 14

Sec. 700 28

Sec. 703 28

Service Contract Act of 1965, Public Law 89-286, as amended, P.L. 93-57 26

28 U.S.C:

Sec. 1343(3) 2, 3, 8

Sec. 1381 3

29 U.S.C. (Taft-Hartley Law):

Sec. 7 28

Sec. 157 29

Sec. 187 2

40 U.S.C.A., 46 Stat. 1494 (Davis-Bacon Act):

276(a)-276(a-7) 26

41 U.S.C.A., 49 Stat. 2036 (Walsh-Healey Public Contracts Act):

35-46 25

42 U.S.C.:

Sec. 1983 ..... 5, 8, 9

Wagner Act 28

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INTERVENOR-APPELLANT'S BRIEF

Questions Presented

I. Did the District Court err in refusing to abstain from exercising jurisdiction?

II. Have any of the plaintiffs demonstrated standing to sue or entitlement to obtain relief?

III. Did the District Court err in finding on the evidence that no rational connection exists between defendants' union label requirement for flat form printing work and their desire to insure that the prevailing wage rate be paid to printing tradesmen?

Statement of the Case

The complaint in 74 CIV 3155 was filed on July 24, 1974 in the United States District Court of the Southern District of New York by Master Printers of America, a division of a non-profit corporation, on behalf of itself and certain of its members, and by Image Carrier Corporation and two other printing companies, on behalf of themselves and all other similarly situated, against New York City, its Board of Higher Education, its Health and Hospitals Corporation, and the New York City Board of Education, a New York State agency. The defendants moved for dismissal of this action on October 4, 1974. The case at that time was assigned to the Honorable Lloyd F. MacMahon, USDJ, for all purposes.

An amended complaint (13a) added as defendants a large number of officials of the four defendant governmental entities. The complainants invoked the Court's jurisdiction pursuant to the provisions of 28 USC §1343 (3) and sought a permanent injunction against the defendants' practice of restricting bidding upon certain printing contracts to printers whose employees were represented by labor organizations and exhibit the union label. The plaintiffs claim that this practice deprives them of opportunities in violation of rights secured by the due process and equal protection clauses of the Fourteenth Amendment, and denied to their employees the rights guaranteed them in 29 USC §187 (Taft-Hartley Law) to reject a labor organization as their representative.

On December 30, 1974 the plaintiffs filed a motion for determination that this action be maintained as a class action. On January 15, 1975 Judge MacMahon ordered that Allied Printing Trades Council of Greater New York (herein called Allied), an unincorporated association consisting of twelve printing trades unions, have leave to intervene as a defendant (24a). On January 17, 1975 Allied filed application to intervene, answer to the complaint and a motion to dismiss the complaint (33a). On January 20, 1975 the other defendants also moved to dismiss the amended complaint (37a).

On August 22, 1975 Judge MacMahon issued a Decision and Order (65a) in which he (1) denied plaintiffs' motion to maintain this action as a class action, (2) denied defendants' and defendant intervenor's cross-motions to dismiss the amended complaint for failure to state a claim, and (3) denied defendant intervenor's cross-motion to dismiss on the grounds that this Court should defer to the National Labor Relations Board, that this Court should abstain from exercising jurisdiction because this action should have been brought in the State Courts, that Master Printers lacks a legal capacity to bring this action and that the amended complaint fails to state a proper class action. Judge MacMahon granted (1) defendants' cross-motion to dismiss as to plaintiffs Design Distributors and Schubert for lack of standing and as to all plaintiffs for lack of subject matter jurisdiction under 28 USC §1381, and (2) defendants' and defendant intervenor's cross-motions to dismiss as to plaintiff Master Printers for lack of standing under 28 U.S.C. §1343(3). Judge MacMahon dismissed as to defendant City and its agencies *sua sponte* for lack of subject matter jurisdiction under 28 USC §1343(3)

On March 15, 1976 the plaintiffs moved to consolidate this action with 75 CIV 6443, which had been assigned to

Judge Thomas P. Griesa, on the ground that both cases present identical questions of law and fact. Following submission without oral argument, Judge MacMahon granted this motion on April 30, 1976 (85a). The defendants filed answers to the consolidated complaint on August 10, 1976 and September 9, 1976 (87a).

On November 24, 1976 defendant Allied moved to compel plaintiff to produce for inspection and copying certain documents. On November 30, 1976 Judge MacMahon denied said motion as being made too late, and directed Allied to subpoena said documents for production at the trial.

Non-jury trial was begun and concluded on December 6, 1976. In his decision filed April 8, 1977 (n.o.r.) (90a), Judge MacMahon found, on the evidence, that the defendants' policy and practice of bidding upon and awarding printing contracts only to those printers whose employees are represented by labor unions and who therefore can exhibit a union label violates the equal protection clause of the Fourteenth Amendment. On April 20, 1977 Judge MacMahon filed Order and Judgment and stayed his Order pending appeal to this Court.

Notices of Appeal to this Court were filed by the defendants on April 22, 1977 and May 2, 1977 (104a, 105a).

Statement of Facts

On April 12, 1934 the City of New York adopted a Resolution (*infra,* p. 13) which required bidders for most public printing work to operate a union plant and pay the prevailing rate of wages. Every municipal administration has adopted this union label policy down to date, in order effectively to police the payment of prevailing wage rates (114a, 118a-119a). The defendants, officers of

the City of New York and of the City's Board of Education and Health and Hospitals Corporation, have complied with this policy.

The New York City Board of Education requires that all printing work, with certain specific exceptions, be performed by union plants (126a). Said Board of Education, an agency of the State of New York, thereby is complying with applicable New York State law (129a-131a).

The plaintiffs are three nonunion printers—Associated Litho and Letter Service, Inc., Image Carrier, Inc. and The House of Lithography, Inc., which have 4 employee printers, 1 employee printer and no employee printers respectively. None of the plaintiffs has bid on any of defendants' jobs, including jobs which did not require a union label.

POINT I

Judge MacMahon should have abstained from exercising jurisdiction.

The Court below in its opinion erroneously stated "We do not think, however, that abstention is warranted here because neither party has either raised, much less requested, abstention * * *" (91a)

In its Memorandum Decision, dated August 22, 1975, the Court below denied, *inter alia,* Allied's cross-motion to dismiss on the ground that "the court should abstain from exercising jurisdiction because this action should have been brought in the State courts" (72a).

This Court through Judge Mansfield in *McRedmond* v. *Wilson,* a 42 U.S.C. §1983 civil rights class action brought by children who had been adjudicated persons in need of

supervision, recently summarized the doctrine of *Pullman* abstention as follows:

> "[3] In general, the three essential conditions for invocation of the doctrine of abstention are that the state statute be unclear or the issue of state law be uncertain, *Harman* v. *Forssenius, supra,* 380 U.S. at 534, 85 S.Ct. 1177, that resolution of the federal issue depend upon the interpretation to be given to the state law, *Wright* v. *McMann,* 387 F.2d 519, 525 (2nd Cir. 1967), and that the state law be susceptible of an interpretation that would avoid or modify the federal constitutional issue. In such circumstances abstention will be upheld. As we recently recognized in *Reid* v. *Board of Education of City of New York,* 453 F.2d 238 (2d Cir. 1971), although these conditions precedent do appear to be strict on their face, they offer some room for play in the joints." 533 F.2d 757, at 761.

The Court below admitted that New York law relating to the union label requirement is "unsettled" (92a).

The three essential conditions for invocation of the *Pullman* abstention doctrine are available here. The New York State Supreme Court in *Amalithone Realty Co.* v. *City of New York,* 162 Misc. 715 (Sup. Ct., N.Y. 1937) upheld New York City's requirement of a printer's union label and stated: "The presence of the union label may reasonably be considered as a fair assurance that the products have been manufactured under conditions in accord with present social consciousness". On appeal the Appellate Division affirmed, but without opinion. 251 App. Div. 450 (First Dept., 1937).

No printing contractor who chose to pay the prevailing rate of wages as defined in §220 of the New York State Labor Law (discussed *infra,* pp. 14-15) nor any other

printing contractor has applied to a New York State court for a ruling that the union label requirement violates the Fourteenth Amendment.

This Court may reasonably infer that if the plaintiffs were to allege and establish that they pay the prevailing wage rate and were to seek a State court ruling that defendants' union label requirement may not constitutionally be applied to them, the State court might well rule that, since the New York City Resolution requiring a union label was promulgated for the purpose of insuring that employees working on certain New York City printing contracts be paid the prevailing rate of wages, the application of the union label requirement to plaintiffs is inappropriate.

Inasmuch as no New York State Appellate Court has issued an opinion with respect to the constitutionality of a union label requirement imposed to insure the payment of the prevailing wage rate (a) the manner in which the State court would construe the New York City Resolution in issue here is uncertain, (b) the resolution of the Fourteenth Amendment question may depend upon whether the New York City Resolution is applied to employers who pay the prevailing wage rate, and (c) this Resolution is susceptible of an interpretation that would avoid or modify the equal protection issue.

The Supreme Court's most recent decision applying the abstention doctrine of *Younger* v. *Harris,* 401 U.S. 37, and *Huffman* v. *Pursue,* 420 U.S. 592, which doctrine applies principles of comity and federalism to the ability of the State courts to consider the federal constitutional question in the context of state proceedings, is *Trainor* v. *Hernandez,* No. 75-1407 (May 31, 1977). In *Trainor* the Federal courts restrained enforcement of the Illinois Attachment Act through civil proceedings as violative of the Fourteenth Amendment's due process clause. The

Supreme Court reversed and remanded until the State courts construed the challenged statutes. (*Accord: Juidice* v. *Vail,* U.S. Sup. Ct., No. 75-1397, issued March 22, 1977 on appeal from the U. S. District Court for the Southern District of New York, involving penalties imposed upon judgment debtors during State contempt proceedings, declared unconstitutional in a 42 U.S.C. §1983 action.)

The Court below therefore should have exercised a *Pullman* abstention and arguably a *Younger* abstention until the plaintiffs have given the New York State courts an opportunity for the first time in the 43 year history of the union label requirement, to attempt to reconcile the equal protection clause with New York's desire that printing tradesmen who perform governmental work shall receive prevailing wage rates.

POINT II

Plaintiffs lack standing, or have failed to demonstrate their right to obtain relief.

In its Memorandum Decision of August 22, 1975, the Court below with respect to standing held *inter alia* that the plaintiff Master Printers of America lacks standing under 28 U.S.C. §1343(3), but held that Image Carrier Corporation as a potential bidder on flat form printing contracts has such standing because "foreclosure from an opportunity to bid can result in legal injury sufficient to establish standing", citing *Ballerina Pen Co.* v. *Kunzig,* 453 F.2d 1204 (D.C. Cir. 1970); *Master Printers Ass'n.* v. *Board of Trustees of Junior College Dist. No. 508, City of Chicago and State of Ill.,* 356 F. Supp. 1355 (N.D. Ill. 1973) (74a).

In its Opinion following trial, the Court below made no further reference to the question of standing.

We respectfully urge that the Court below incorrectly relied upon *Ballerina.* Ballerina was not merely a potential bidder, but was a successful bidder who following successful bids had supplied the federal government with ballpoint pens, following which the government withdrew from the open market and purchased its pens from a single agency for blind workshops. In *Master Printers Ass'n.* the Illinois District Court also incorrectly relied upon *Ballerina.*

The Supreme Court in *Warth* v. *Seldin,* 422 U.S. 490, (1975), a 42 U.S.C. §1983 action to enjoin enforcement of an exclusionary zoning ordinance, ruled that a petitioner does not have standing to sue in the Federal courts, where he does not "allege specific concrete facts demonstrating that the challenged practice harmed him and that he personally would benefit in a tangible way from the court's intervention", and does not present individualized proof of both the fact and extent of injury. Petitioner Housing Council had no standing because there was no showing that it had suffered harm or that respondent "delayed or thwarted any [building] project." The individual petitioners lacked standing because they did not show *inter alia* that they had the resources to benefit from a change in respondent's practices.

Based upon these considerations cited by the Supreme Court in *Warth,* the status of potential bidder clearly does not by itself suffice to confer standing to sue.[1] Two of the three plaintiffs, Image Carrier Corporation, which has one employee printer, and House of Lithography, Inc., which has no employee printers, would have been

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[1] Judge Gurfein in *City Chemical Corporation* v. *Shreffler* (S.D. N.Y. 1971) 331 F.Supp. 46, held that a losing bidder was an "interested person" entitled to contest an award of a government contract. The status of potential bidders was not explored.

rejected as bidders by the defendants because they lack sufficient employees to do any work themselves, without brokering the work (122a-123a).

The third plaintiff, Associated Litho Letter Service, Inc. which has 4 employee printers, admitted that it cannot do flat form printing (109a)—the printing which requires a union label—and New York City testified that a bid by Associated Litho for substantial work would have been rejected with or without a union label (123a).

None of the plaintiffs ever bid on any of defendants' printing jobs—even on jobs which did not require a union label (109a, 136a, 144a). The plaintiffs did not write to any defendant to learn which of their jobs require a union label and which did not, and none of them elicited such written response in any manner (140a, 146a-147a). Neither did the non-union trade association whose representative, Edward Blank, testified for the plaintiffs advise its membership which of defendants' jobs required a union label and which did not (163a). One plaintiff testified that he failed to bid on a school job because of a statement made to him during a telephone conversation which statement in fact is erroneous—that *all* school printing jobs require a union label. The likelihood that any of the plaintiffs would have been a successful bidder even absent the union label requirement for a job which requires the union label is small indeed (139a-140a).

While other non-union printers might well be potential successful bidders, no such potential successful bidder saw fit to participate in this action.[2]

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[2] One plaintiff, Deven Lithographers, Inc., withdrew at the inception of the trial on the ground that this Court had before it a proceeding by the National Labor Relations Board to enforce its order that Deven must bargain collectively with a printers union (107a).

The same considerations that establish the plaintiffs' lack of standing also establish *a fortiori* that they have not demonstrated their right to obtain judicial relief. The reluctance of the courts to issue sweeping orders based upon claims of violation of the equal protection clause, made by plaintiffs who lack clear entitlement to relief, is well illustrated by the recent decision of the New York State Court of Appeals in *Alevy* v. *Downstate Medical Center* (1976), 39 N.Y. 2d 326.

In *Alevy* the Court of Appeals reached the issue of reverse discrimination in admission to institutions of higher education which was avoided on grounds of mootness by the U.S. Supreme Court in *DeFunis* v. *Odegaard*, 416 U.S. 312, and found that such reverse discrimination may be constitutional. The Court of Appeals denied relief, however, and stated:

> Although this record is somewhat sparse in content, we think petitioner has established, in essence, that respondent practiced reverse discrimination. However, we need not proceed further, as we ordinarily might, to inquire whether less objectionable alternatives exist, since petitioner failed to establish a prima facie case of discrimination as it relates to this case in that he failed to show his own right to relief, even if the entire minority program were eliminated. Petitioner was 154 on the priority list. Even if all 21 accepted or registered minority students plus the 19 minority students on the two waiting lists were declared ineligible for admission to the college, petitioner would still not be entitled to a position in the class since 114 students would still have priority over him. We conclude, therefore, as did the courts below, that petitioner did not establish a right to relief and thus the petition should be dismissed.

> We do not in any sense hold that petitioner lacks standing to maintain this proceeding. Rather, we hold only that upon this record he has not demonstrated his ultimate right to obtain relief. Indeed, it is only as a consequence of the present litigation that the minority program has been explored and that his actual predicament has been demonstrated; in the procedural posture and circumstances of this case, the fact that petitioner was not ultimately entitled to relief was not disclosed prior to the hearing on the merits. Standing to seek judicial review does not depend on a threshold demonstration of the narrower, final right to an individual remedy (see, e. g., *Burke* v. *Sugarman,* 35 N.Y.2d 39, 44, 358 N.Y.S.2d 715, 718, 315 N.E.2d 772, 774). Hence, although petitioner had standing, in the final analysis he failed to demonstrate that he, personally, suffered any legal harm as a result of respondent's student selection process. 384 N.Y.S.2d 82 at 91-92.

Since none of the plaintiffs demonstrated that it suffered any legal harm as a result of the defendants' union label requirement, none has a right to judicial relief in this case.

POINT III

A rational connection exists between the defendants' union label requirement for flat form printing work and their desire to insure that the prevailing wage rate be paid to printing tradesmen.

The need to insure the payment of prevailing wages for public work is a legitimate state and municipal interest. It is undisputed that the union label requirement for certain printing work provides a rational and reasonable basis for insuring that printing employees performing defendants' printing work will be paid prevailing wage rates. While the union label does increase the cost of doing printing business, its adoption does not work an unfairness, but merely disables employers from bidding lower than competitors based upon lower wage rates.

The New York City Resolution of April 12, 1934 executed by Mayor LaGuardia, Comptroller Cunningham and Corporation Counsel Windels, in pertinent part stated:

> 1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.
>
> 2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment.

Pyramiding error upon error, the Court below found, without a shred of justification, that "the evidence here refutes defendants' contention that the challenged classification rationally furthers that purpose [of insuring that the prevailing wage rate be paid to printing employees]" (96a).

The erroneous links in the Court chain of erroneous inferences are:

1) that union contracts do not shape the prevailing wage rate as defined by §220 of the New York State Labor Law unless the majority of printing trades employees are unionized (96a);

2) that the evidence indicates that the majority of printing trades employees in the New York area are not unionized (96a);

3) that "there is no correlation between the union or nonunion status of the printing company and the wage rate it pays to its employees" (96a); and

4) that there is no "correlation between the prevailing wage rate and the union or nonunion status of the printing company" (96a-97a).

The Court's belief that union contracts shape the prevailing rate only if the contracts cover a majority of the employees in the area clearly indicated the Court's failure to examine the text of §220 of the Labor Law to which the Court refers. Under §220 union contracts substantially shape the prevailing rate even if less than 40% of the printing employees are unionized. The definition of "prevailing wage rate" in pertinent part reads:

> 5. Definitions. a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality as hereinafter defined to the majority of workmen, laborers or mechanics in the same trade or occupation. In the event that it be determined that there is not a majority in the same trade or occupation paid at the same rate, then the rate paid to the greater number in such trade or occupation shall be the prevailing rate, provided such greater number constitutes at least forty per centum . . .; in the event

> there is less than forty per centum . . . paid the same rate, then the average paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. . . .
>
> b. "Supplements," for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance.

* * *

The foregoing excerpt from the text of §220 establishes that even if the majority of printing tradesmen in New York City were not unionized and that less than 40% of them were unionized, Judge MacMahon's statement that correlation is lacking between the prevailing wage rate and the unions' contracts simply makes no sense. The prevailing wage rate is a statistical fact—a quantity of dollars per hour. Union contracts greatly influence that fact regardless of the number of employees which these contracts cover. The Court's rejection of the existence of the inevitable correlation between the union wage scale and the prevailing wage rate is inconceivable.

Judge MacMahon adverted to the provision in the New York City Resolution of 1934 that the N.R.A. Compliance Board submit reports "on the bidder's compliance with the code requirements" as indicating that the union label was "unnecessary" to insure payment of the prevailing wage (95a). All New York City Administrations which succeeded the LaGuardia Administration have continued to enforce the union label policy, long after the N.R.A. Compliance Board's brief existence was terminated.

The Court's conclusion that the nonunion printing employees outnumber unionized employees in New York City is based upon the testimony of plaintiffs' expert Edward Blank, the Director of Printing Management of Master Printers of America, that his Association has enrolled 350 open shop plans (where employees are not required to be members of unions) and only 250 union shop plants (150a). Assuming arguendo that all of the union shop plants in New York City had joined Blank's Association, the Court's statistical inference is nonetheless inexcusable, particularly since the 3 nonunion plaintiffs have a total of 5 printing trades employees. Apparently the size of the plaintiffs' work force of printing tradesmen fairly indicates the size of the typical printing open shop in the New York area. It may fairly be presumed that if Edward Blank's Association included open shops with substantial numbers of employees, the financial impact of the defendants' union label policy would bear much more heavily upon them than upon the plaintiffs, and one or more of the employers with large payrolls in the Association would have lent its name to this lawsuit.

The Court's further finding that there is no correlation between the union or nonunion status of a printing company and the wage rates it pays is untenable. Blank testified on direct examination that "There are some open shops that are paying equally as high as union shops" (155a). Asked during cross-examination to name such shops Blank testified as follows:

> A. You want me to give you names of those plants that pay over the union scale, the union minimum requirements, is that it?
>
> Q. If you know any. A. Oh, yes.
>
> Q. How many? A. I can name a few.
>
> Q. How many? A. I have to give it some thought. I have some records to look at and things of that

nature, but I would venture to say I could give you three, four, five.

Q. And that is out of the 350 open shops that are members of your organization? A. Yes, sir.

Q. You are not prepared to give us those names now, are you? A. No, I don't have that information. (163a)

* * *

Q. Mr. Blank, when you testified earlier that you believed there were three or four open shop companies which paid union scale rates, did you mean that they paid union scale rates across the board to all their printing employees or that they paid such rates to selected employees? A. There would be some of both categories. Some pay selected rates to various people and some pay across the board according to the union scales.

Q. Can you name any which pay across the board to all their printing employees at this time? A. Not at this time. (164a-165a)

* * *

The fact that nearly all of Blank's Association's open shops pay less than union rates thus is conceded by Blank. The Court below had no warrant to find otherwise.

The record testimony and evidence establishing the substantial disparity between the compensation paid to plaintiffs' employees and the applicable union wage scales follows:

As To The 4 Printing Employees of Associated Litho:

Cross Examination by Mr. Rothfeld:

Q. What is Mr. Adams' gross pay? A. I don't know. I have to look at the exhibits I handed in.

Q. I show you—

The Court: First show me how it is relevant.

Mr. Rothfeld: If your Honor please—

The Court: I have read your brief. We are not concerned here with what the wages are, what the working conditions are.

We are concerned solely with the question of whether this is a reasonable classification and that to me seems to turn on whether you are going to be able to do the kind of work as well as a union shop; not what the working conditions are.

This isn't a labor case.

Mr. Rothfeld: If your Honor please, Mayor LaGuardia—

The Court: I read your brief. I know what Mayor LaGuardia instituted.

Will you answer my question? Why is what you say relevant? How are wages or working conditions or anything else relevant to the question before me?

Mr. Rothfeld: I believe one question before your Honor is whether the City of New York has a right to require that the persons who bid for New York City jobs pay the prevailing rate of wages.

The Court: That is not the question before me. I already ruled that this plaintiff states a claim for relief that if the sole basis of discrimination here is because one shop is union and the other not, that is illegal.

If that is the question, there is nothing to try

I am not here to determine whether they pay wages or not. I am not going to listen to that. That is not relevant.

Mr. Rothfeld: May I make an offer of proof?

Mr. Anderson: Objection.

The Court: I will take your offer of proof.

Mr. Rothfeld: If permitted to cross-examine Mr. Weiss, the testimony would be that Mr. Weiss' four printing employees are paid hourly rates of pay that are far below the prevailing wage in the City of New York for employees who do the same work as the witness' employees perform.

Further, that the witness' employees do not have any pension plan coverage whereas the prevailing rate of pay for printing employees in the City of New York, as shown by the union scales, includes a very substantial pension for printing employees.

The Court: Perhaps you would stipulate that that will be the test.

Mr. Anderson: I have some problems with that particular stipulation.

The Court: Do you agree with me that it is totally irrelevant?

Mr. Anderson: Yes, sir.

The Court: Then why can't you stipulate? That is what he said.

Mr. Anderson: If the Court thinks it is irrelevant then I will be inclined—

The Court: Then stand on the question of law.

Mr. Anderson: All right, sir, although I would disagree with portions of his statement. If the Court will not permit examination on that point from this witness—

The Court: Can't you stipulate that and we don't have to listen to a lot of nonsense here in this trial?

Mr. Anderson: All right, sir. As long as the Court feels it is irrelevant.

Mr. Rothfeld: Counsel's statement, "All right, sir" having stated he disagrees with portions—

The Court: You stipulate that that is what he would testify to unequivocally?

Mr. Anderson: In response—

The Court: In response to me, do you or don't you?

Mr. Anderson: Yes, sir.

The Court: All right, he stipulates to that. (110a-112a).

* * *

As To Image Carrier's Single Printing Employee:

Mr. Rothfeld: If your Honor please, is your ruling with respect to the wages and pension or lack of pension paid to this witness' employee to be the same as that of the employees of House of Lithography, Inc?

The Court: I surely think it is irrelevant but if you want to put it in for what it is worth, go ahead.

Q. What is the name of your printing employee? A. Israel Colon.

Mr. Anderson: We would object as to relevancy, your Honor.

The Court: I will sustain the objection but take it over your objection. If it is brief so we can get it in the record. There is no jury here.

Q. Is Mr. Colon covered by a pension plan? A. A. No, he is not.

Q. What is his hourly rate of pay? A. I can't tell you that but his weekly rate is $170 per week. He wo[illegible] 37½ hours.

The Court: Is that less than union scale?

The Witness: I don't know, sir. (146a)

* * *

House of Lithography has no printing employees (134a).

This Court is respectfully referred to defendant intervenor's Exhibits A through E, which show printing union wage rates, pension plan provisions, dental benefit, sickness and accident benefits and surgical benefits respectively (164a).

The testimony of Bernard DeSiano, Representative of Local 51, establishing that the compensation of Associated Litho's employees would be substantially increased if they were unionized, is here set forth:

Direct Examination by Mr. Rothfield:

Q. Mr. DeSiano, what is your position? A. I am a business representative for the New York Printing Pressmen and Offset Workers Union, Local 51 AFL-CIO.

Q. What is the jurisdiction of Local 51? A. We have jurisdiction in various plants in letter press, printing, offset printing, graphics stripping, plate making.

Q. Now, sir, I am addressing myself to the testimony of Associated Litho Service that the company employs one journeyman printer, two multilith operators and one folder and cutter.

If that journeyman printer were a member of Local 51, what would his minimum weekly wage be?

Mr. Anderson: Objection.

The Court: I will take it over your objection, just in the interest of getting it in the record.

A. On the multi, $300 a week.

Q. Not multilith, a journeyman printer. A. On the multi, which I understand he said he had two multis, $300.

Q. $300— A. Per week.

Q. Is the multilith operator's weekly wage? A. Right.

Q. On the letter? A. On the letter press—

Q. What would it be? A. 334.

Q. That would be for the first shift? A. First shift. 358 for the second shift or 356, and 365 for the second shift.

Q. That's for a week of how many hours? A. 34½ hours.

Q. With time and a half for overtime? A. Time and a half for overtime.

Q. What would the weekly wage of Associated Litho's folder and cutter be if he were represented by your union? A. $335 per week.

Q. And is that pursuant to this contract? A. Yes. That's pursuant to that contract. As far as the press work is concerned. And the bindery contract.

Mr. Rothfield: I offer it in evidence.

Mr. Anderson: We object to relevancy.

The Court. You have a standing objection to relevancy of any of this. Take it.

(Defendant's Exhibit F received in evidence.)

Q. Are your members covered by pension plan? A. Yes.

Q. What would the pension be if Associated Litho's employees were under your contract and were to retire? A. Approximately $180 if he was retiring today.

Q. $180 per month— A. Per month.

Q. Are your members covered by life insurance? A. Yes.

Q. Up to what amount? A. $26,000.

Q. What type of life insurance? A. A limited age 65.

The Court: Group life?
The Witness: Yes.

Q. Are your members covered for hospitalization and major medical? A. Yes.

Q. How much? A. $25,000 major medical and—

Q. How many days hospital? A. 180 days.

Q. In the event that your members or the employees of Associated Litho were your members and were to be laid off, would this hospitalization and major medical continue while they were unemployed? A. It would continue for themselves and their dependents for six months.

Q. And their dependents includes children to what age? A. Age 19.

Q. And if they are full time students? A. If they are full time students, age 23.

Q. If Associated Litho's employees were covered by your contract, would they have a guaranteed vacation? A. Yes.

Q. How long? A. Four weeks.

Q. Four weeks? A. Four weeks a year.

Q. Holidays? A. Eleven holidays.

Q. Would they be covered by a sick leave policy? A. Five days sick leave.

Mr. Rothfeld: Your witness.
I offer F in evidence.
The Court: It was received.
Mr. Anderson: No questions. (168a-170a)

After correctly ruling that Edward Blank's Association lacks standing to sue, and after correctly refusing to certify the plaintiffs' action as a class action, the Court below in effect found that defendants' union label requirement lacked a rational basis, not as applied to any of the named plaintiffs but as applied to the several unnamed

nonunion employers which Blank testified allegedly pay union scale wages.

Finally, the statement of the Court below that correlation is lacking between the prevailing wage rate and the printing employer's union or nonunion status is unclear as well as erroneous. Any "prevailing" fact is by this very term applicable to the entire area covered, either by legislation of or as the product of computation. Whether or not the 40% rule set forth in §220 of the Labor Law applies, which makes the unions' rate *ipso facto* the prevailing rate, or whether an average rate would have to be computed, it is indisputable on the evidence that the union shops pay the prevailing rate (if the contracts are used) or higher (if an average is computed), and that nearly all of the nonunion shops, including the plaintiffs, pay less than the prevailing rates.

The Supreme Court in *Massachusetts Board of Retirement* v. *Murgia,* 44 U.S.L.W. 5077 (U.S. June 26, 1976), held that when the courts employ the rational basis standard in ruling legislative action, the legislature's creation of a classification is presumptively valid. The Supreme Court stated:

> "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. *Dandridge* v. *Williams,* supra, at 485. Such action by a legislature is presumed to be valid." 44 U.S.L.W. at 5079.

None of the testimony at the trial justified the rebutting by the Court below of the presumption of the validity of defendants' union label policy.

In any event, since the Federal Constitution does not mention labor unions or wages, it is doubtful that the

equal protection clause is applicable to local policy relating to labor unions and wages. See *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 at 35, wherein the Supreme Court relegated to the State Courts litigants who attacked the unequal financing of schools, because the Federal Constitution does not mention education.

POINT IV

New York State and Federal public policy foster prevailing wage rates for public work.

The Constitution of the State of New York, Article 1, §17, expressing the public policy of this State in effect since 1894, provided that employees performing "public work" shall be paid no less than the area wage rate prevailing for this work, in pertinent part stating:

> "No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall * * * be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the State where such public work is to be situated, erected, or used."

Federal public policy clearly favors a union-negotiated wage scale for most public contracts.

Employers whose employees work on Federal contracts of greater than *de minimis* size must pay those employees the prevailing area wage rate. This public policy is enacted into law, as follows:

(a) The Walsh-Healey Public Contracts Act, 49 Stat 2036, 41 USCA 35-46, requiring contractors who manufacture or furnish supplies to Federal agencies, pursuant to

contracts exceeding $10,000 to pay prevailing area wage rates to their employees;

(b) The Davis-Bacon Act, 46 Stat 1494, 40 USCA 276(a)-276(a-7), which applies prevailing wage rate requirements to contracts of over $2,000 for construction, repair, painting and decorating of public works;

(c) The Service Contract Act of 1965, Public Law 89-286 as last amended by P.L. 93-57 effective July 6, 1973, which requires for every contract of over $2,500 to furnish service employees to Federal Agencies, that the wages and fringe benefits to be paid be either the prevailing wage rate or the rates set forth in any collective bargaining agreement covering the employees.

As administered by the United States Department of Labor, the prevailing wage rate required by the above statutes is virtually synonymous, at least in industrial areas, with the wage rate contained in the collective bargaining agreements made with the unions which represent substantial fractions of the employees who perform the type of work involved.

The Supreme Court dramatically upheld the right of each state to determine its own wage policy in *National League of Cities* v. *Usery,* 96 S.Ct. 2465. In *Usery,* the Supreme Court held that Congress may not compel state and local governments to pay a minimum wage. The Supreme Court held that the 1974 amendments to the Fair Labor Standards Act, which extended the Act's minimum wage and maximum hour provisions to employees of states and their political subdivisions, are unconstitutional, stating that the States' power to determine the wages, hours worked and overtime compensation of these employees is an "undoubted attribute of state sovereignty". Id. at 2471.

As stated on August 16, 1976 by NLRB General Counsel John S. Irving at the American Bar Association Convention, *Usery* means:

> "As of now, it appears the federal equal pay law, which is part of the FLSA minimum wage provisions; no longer applies to state and local government workers, and that the special statutory overtime pay provisions for law enforcement personnel and firefighters are void. Presumably, the federal law prohibiting discrimination because of age, extended to public employees by the 1974 amendments, will also be held not applicable to state and local government workers. Finally, prospects for a federal law establishing collective bargaining rights for employees of state and local governments appear to be virtually dead." 92 LRR 313

Since a state has the power to act so as to *depress* the minimum wage paid for performance of state work, then surely another state has the power to act so as to *uphold* the prevailing union scales, the wages and the terms and conditions of persons who perform state work.

In the same vein, the Supreme Court in *DeCanas* v. *Bica,* 96 Sup. Ct. 933, upheld a state's right to prohibit the employment of illegal aliens, as not preempted under the Supremacy Clause and Congress' preemption of the fields of immigration and naturalization. The Supreme Court said that states have broad power in regulating employment and noted: ". . . acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions."

POINT V

New York State public policy fosters collective bargaining.

The New York State Labor Law is the most pro-union labor relations act in the United States. This law is similar to the National Labor Relations Act as originally enacted in 1935—the Wagner Act, and before it was amended in 1947 and became known as the Taft-Hartley Act.

Section 700 of the New York State Labor Law states, in pertinent part, that the absence of collective bargaining

> ". . . creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the disparity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed."

and further provides "it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining,".

The degree of partiality of New York State's pro-union public policy is easily exemplified by comparing §7 of the Taft-Hartley Law with §703 of the New York State Labor Law. Both laws begin by stating:

> "Rights of employees
>
> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection,".

At this point these laws begin to differ in that the Taft-Hartley Act adds "and shall also have the right to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §8(a)(3)" (29 USCA 157).

The New York State Labor Law does not confer upon employees the right to refrain from union activities, as does Congress with respect to employers engaged in interstate commerce. Neither does the New York State Labor Law recognize any union activities as unfair labor practices. The New York State Labor Law legitimitizes and encourages the establishment and maintenance of "closed shops", whereas the Taft-Hartley Law prohibits closed shops. Said New York State Labor Law applies to all printing establishments which perform work in New York State which are not engaged in interstate commerce. Those printers who are engaged in interstate commerce are under the jurisdiction of the National Labor Relations Board pursuant to the National Labor Relations Act, as amended.

We do not urge that a rational basis exists for a state's requirement of a union label for all bidders on government purchase contracts. For example, if the defendants had purchased automobiles and had desired that the workers on those automobiles be paid prevailing wage

rates, and if General Motors had a nonunion automobile plant in New York City, a very small staff of inspectors might well suffice to police payment by General Motors of prevailing wage rates. Effective inspection, however, of the rates paid by nonunion printers who employ minuscule staffs that work around the clock, or who broker their contracts manifestily would be impossible. Defendants' union label requirement for printing contracts merely turns over the responsibility of enforcing prevailing wage rate requirements to the unions and saves the taxpayer the need to require the defendants to hire an additional large corps of inspectors of wage standards.

Union labels also might be inappropriate in connection with the construction of public structures. In this courtroom, for example, there is no practice of affixing in any location labels of the many building trades which participated in its construction. One product which lends itself most readily to the requirement of affixing a union label is a printed document, hence the peculiar appropriateness of such label requirement in the printing industry.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the Decision of the District Court and grant the defendants judgment dismissing the Complaint.

Dated: New York, New York
June 15, 1977

Respectfully submitted,

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375—Affidavit of Service

In The
United States Cour of Appeals
for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Image Carrier Corporation
Plaintiff-Respondent
against
Abraham D. Beame, Mayor of New York City et al.
Defendants-Appellants

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Norman Rothfeld Esq. being duly sworn, deposes and says that he is over the age of 21 years and resides at 11 Park Place New York, New York

That on the 17th. day of June 1977 at 220 East 42nd. Street New York, New York he served the annexed Intervenor-Appellant's Brief upon Townley Updike Carter & Rogers Esqs. in this action, by delivering to and leaving with said attorneys 3 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 17th. day of June 19 77

Raymond J. Braddick

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Residing in Delaware County
Commission Expires March 30, 19 7 4

Service of three (3) copies of
the within
hereby admitted this day
of , 197

Attorney for

Service of three (3) copies of
the within
hereby admitted this day
of , 197

Attorney for

THREE COPIES OF THE WITHIN PAPER
HAVE THIS DAY BEEN RECEIVED AT THE
OFFICE OF THE CORPORATION COUNSEL

June 17, 1977

CORPORATION COUNSEL